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ECOLAB INC.

13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION
17

18 JOHN MARTINO, an individual, for
himself and those similarly situated;
19 ADONIS AMOROSO, an individual, for
himself and those similarly situated; and
20 ROES 1 through 30,000 and the proposed
Class,

21 Plaintiff,

22 v.
23

24 ECOLAB, INC., a Delaware Corporation;
and DOES 1 through 100, inclusive,

25 Defendant.
26
27
28

Case No. _____

*SANTA CLARA SUPERIOR COURT CASE:
114CV266125*

**NOTICE OF REMOVAL OF CIVIL
ACTION TO FEDERAL COURT BY
DEFENDANT ECOLAB INC.**

[28 U.S.C. §§ 1332, 1441 & 1446]

Complaint filed: August 21, 2014

1 TO THE CLERK OF THE FEDERAL DISTRICT COURT FOR THE NORTHERN DISTRICT OF
2 CALIFORNIA:

3 PLEASE TAKE NOTICE that Defendant ECOLAB INC. (“Ecolab”)
4 contemporaneously with the filing of this Notice, hereby effect removal of the above-referenced
5 action from the Superior Court in the State of California for the County of Santa Clara to the United
6 States District Court for the Northern District of California.

7 This action is removed pursuant to the procedures found in 28 U.S.C. sections 1441
8 and 1446, and removal jurisdiction is based on 28 U.S.C. section 1332(d) (Class Action Fairness Act
9 [“CAFA”]).

10 I. PROCEDURAL BACKGROUND

11 1. This lawsuit arises out of the work performed by Plaintiffs John Martino and
12 Adonis Amoroso (“Plaintiffs”) as exempt employees for Ecolab. On June 4, 2014, Plaintiffs filed a
13 complaint in the Superior Court of the State of California, County of Santa Clara, entitled *JOHN*
14 *MARTINO, ADONIS AMOROSO, et al., v. ECOLAB INC., A Delaware Corporation; and DOES 1*
15 *through 100, inclusive*, designated as Case No. 114CV2266125 (“Complaint”). See Declaration of
16 Richard Rahm (“Rahm Decl.”) ¶ 2, Exhibit (“Exh.”) A. The Complaint asserts the following
17 purported claims for relief: (1) Wages Owed; (2) Failure to Provide Accurate Itemized Wage
18 Statements; and (3) Violation of Business & Professions Code Section 17200 et seq. See *id.*

19 2. On August 21, 2014, Plaintiffs filed their First Amended Class Action
20 Complaint (“FAC”) for: (1) Wages Owed; (2) Failure to Provide Accurate Itemized Wage
21 Statements; (3) Violation of Business & Professions Code Section 17200 et seq.; and (4) Civil
22 Penalties Under the Private Attorney General Act of 2004 (“PAGA”). See Rahm Decl. ¶ 3, Exh. B.

23 3. On August 28, 2014, Plaintiffs served the Summons and First Amended
24 Complaint on Ecolab. A true and correct copy of the Summons and First Amended Complaint
25 package served upon Ecolab is attached as Exhibit B to the Rahm Declaration. Ecolab was
26 subsequently served with a “Civil Lawsuit Notice” by Plaintiff, which apparently came from the
27 Santa Clara County Superior Court. See Rahm Decl. ¶ 4, Exh. C.

4. On September 25, 2014 Ecolab filed its Answer to Plaintiffs' First Amended Complaint in the Superior Court of California for the County of Santa Clara. *See* Rahm Decl. ¶ 5, Exh. D.

5. Pursuant to 28 U.S.C. section 1446(d), the attached exhibits constitute all process, pleadings, and orders served upon Ecolab or filed or received in this action by Ecolab. To Ecolab's knowledge, no further process, pleadings, or orders related to this case have been filed in Santa Clara County Superior Court or served by any party. *See* Rahm Decl. ¶ 5.

6. As of the date of this Notice of Removal, no other parties have been named or served with the Summons and Complaint in this action. *See* Rahm Decl. ¶ 6.

II. REMOVAL PROCEDURE

A. Removal Is Timely Because Notice And The Accompanying Pleadings Have Been Filed Within Thirty Days.

7. An action may be removed from state court by filing a notice of removal, together with a copy of all process, pleadings, and orders served on the defendant, within thirty days of defendant receiving the initial pleading. *See* 28 U.S.C. § 1446(a), (b). Removal of this action is timely because this Notice has been filed within thirty days from August 28, 2014, when Ecolab was served with the First Amended Complaint. *See* Rahm Decl., Exh. B; *see also* 28 U.S.C. § 1446(b). As referenced above, this Notice also contains all process, pleadings, and orders that Plaintiffs served on Ecolab. *See id.*

B. Venue Is Proper In This District Pursuant To The Removal Statute And Diversity.

8. Venue is proper in this Court because Plaintiffs originally filed this action in Santa Clara County Superior Court, located within the District and Division of the Court. *See* 28 U.S.C. § 1446(a). Venue of this action is also proper because jurisdiction is based on CAFA, and the action may be venued in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. *See* 28 U.S.C. § 1391(b).

III. REMOVAL JURISDICTION

A. Statement of Jurisdiction

9. This Court has original jurisdiction over this action pursuant to the CAFA because: (1) at least one member (if not all) of Plaintiffs' putative class is citizen of a state different from Ecolab; (2) Plaintiffs filed a class action on behalf of a class with more than 100 putative class members; and (3) the amount in controversy exceeds the sum of \$5 million, exclusive of interest and costs. *See* 28 U.S.C. § 1332(d).

B. Diversity Exists Because Plaintiffs Are California Citizens And Ecolab Is A Citizen of Delaware And Minnesota.

10. CAFA diversity jurisdiction exists if "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A).

11. Plaintiffs were at the time of the filing of this action, and currently are, residents and citizens of the State of California. *See* Rahm Decl., Exh. B at ¶¶ 1-2; *see also, District of Columbia v. Murphy*, 314 U.S. 441, 455 ("The place where a man lives is properly taken to be his domicile until the facts adduced establish the contrary."); *Guterman v. Wachovia Mortgage*, 2011 U.S. Dist. LEXIS 74521, *4 (C.D. Cal. Mar. 31, 2011) (plaintiff's residence and ownership of property sufficient to establish his domicile in California).

12. For diversity jurisdiction purposes, a corporation is deemed a citizen of its state of incorporation and the state where it has its principal place of business. *See* 28 U.S.C. § 1332(c)(1). Plaintiffs' Complaint concedes that Ecolab "is now and/or at all times mentioned in this Complaint was a Delaware corporation..." Rahm Decl., Exh. B at ¶ 3. At the time this action was commenced in state court, Ecolab was, and still is, a corporation organized under the laws of the State of Delaware. *See* Declaration of Bruce Weiss ("Weiss Decl.") ¶ 2. In addition, Ecolab's principal place of business is in St. Paul, Minnesota, where it has its corporate offices and headquarters. *See id.* *See also Hertz Corp. v. Friend*, 130 U.S. 1181, 1192-93 (2010) (the principal place of business is "where a corporation's officers direct, control, and coordinate the corporation's activities").

13. No other party has been named or served as of the date of this removal. *See* Rahm Decl. ¶ 6. The presence of Doe defendants in this case has no bearing on diversity with respect to removal. *See* 28 U.S.C. § 1441(a) (“[f]or purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded”).

14. As set forth above, Plaintiffs are citizens of the State of California, while Ecolab is a citizen of the State of Delaware and the State of Minnesota. Complete diversity of citizenship thus exists in the instant case.

C. Plaintiffs Allege Claims On Behalf Of More Than 100 Putative Class Members.

15. The CAFA provides this Court with jurisdiction over a class action when “the number of members of all proposed plaintiff classes in the aggregate [is not] less than 100.” 28 U.S.C. § 1332(d)(5)(B). CAFA defines “class members” as those “persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.” 28 U.S.C. § 1332(d)(1)(D).

16. Plaintiffs allege their causes of action with respect to a purported class of all current and former employees of Ecolab in its Institutional Division in California who have held since June 4, 2010 the title of Territory Manager, Territory Sales Manager and/or Territory manager-Hospitality, which they allege to be “over 100 persons.” *See* Rahm Decl., Exh. B, ¶ 6. In fact, there are approximately 233 California-based putative class members who worked for Ecolab during the Class Period. *See* Weiss Decl. ¶ 3. CAFA’s numerosity requirement is accordingly satisfied. *See* 28 U.S.C. § 1332(d)(5)(B).

D. The Amount In Controversy Is At Least \$6.7 Million Dollars Based On The Damages And The Statutory And Civil Penalties Sought By Plaintiffs.

17. The CAFA requires the “matter in controversy” must exceed “the sum or value of \$5,000,000 exclusive of interest and costs.” 28 U.S.C. § 1332(d)(2). “The claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds” this amount. 28 U.S.C. § 1332(d)(6). “In measuring the amount in controversy, a court must assume that the allegations of the complaint are true and that a jury will return a verdict for the plaintiff on all claims made in the complaint.” *Kenneth Rothschild Trust v. Morgan Stanley Dean*

1 *Witter*, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002). Where a plaintiff's state-court complaint does
 2 not allege an amount in controversy, the removing defendant need only establish that plaintiff's
 3 claims exceeds the jurisdictional minimum by a preponderance of evidence. *See Guglielmino v.*
 4 *McKee Foods Corp.*, 506 F. 3d 696, 699 (9th Cir. 2007); *Abrego v. Dow Chemical Co.*, 443 F. 3d
 5 676, 683 (9th Cir. 2006). That is, the defendant need only provide evidence demonstrating that it is
 6 "more likely than not" that the amount in controversy exceeds CAFA's five million dollar
 7 requirement. *See Guglielmino*, 506 F. 3d at 699.

8 18. Ecolab denies the validity and merits of Plaintiffs' claims, the legal theories
 9 upon which they are purportedly based, and the claims for monetary and other relief that flow from
 10 them. Nevertheless, and notwithstanding Plaintiffs' failure to allege the total amount of damages
 11 claimed, the amount in controversy as alleged by Plaintiffs in this case exceeds the sum of five
 12 million dollars.

13 **1. Plaintiffs' Alleged Claims For Recovery Of Unpaid Wages Amounts To**
 14 **Approximately \$ 4.2 Million.**

15 19. Plaintiffs' First Cause of Action is for "Failure to Pay Wages," whereby
 16 Plaintiffs claim they were misclassified as exempt employees and, for that reason, were never paid
 17 overtime. *See Rahm Decl.*, Exh. B at ¶ 10. Specifically, Plaintiffs allege that they "and all members
 18 of the Class *regularly* worked hours for which they were not paid the correct hourly wage," which
 19 means each of the class members "was not paid overtime/doubletime in accordance with California
 20 law." *Id.* at ¶ 11 (emphasis added). In their letter to the California Labor Development and
 21 Workforce Agency ("LWDA"), which is attached to their Complaint as Exhibit A, Plaintiffs further
 22 clarify that the putative class members "*often* work overtime *and* doubletime hours without receiving
 23 overtime or doubletime premium pay." *Rahm Decl.*, Exh. B at Exh. A at 2 (emphasis supplied).

24 20. The word "regularly" has been defined as "often," and both words have been
 25 defined as "frequently." *See Oxford English Dictionary* (Oxford University Press 2014). As to how
 26 frequently Plaintiffs and the putative class members worked overtime and doubletime, Plaintiffs
 27 allege that Ecolab violated Labor Code section 204 "by not paying [putative class members] all
 28 wages due for work performed *each pay period*." *Rahm Decl.*, Exh. B at ¶ 45 (emphasis supplied).

21. Plaintiffs have alleged that in each pay period each putative class member worked both “overtime *and* doubletime.” See Rahm Decl., Exh. B at Exh. A at 2. This means that each putative class member worked *at least* one overtime hour and *at least* one doubletime hour (which includes four overtime hours) per pay period, or five overtime hours and one doubletime hour. Although a number of courts have held that “regularly” can be construed to mean a violation rate of at least once a week, Ecolab has conservatively estimated the violation rate to be five overtime hours and one doubletime hour each pay period, based on Plaintiffs’ allegations in the Complaint. See, e.g., *Patel v. Nike Retail Services, Inc.*, 2014 U.S. Dist. LEXIS 98918, *14-15 (N.D. Cal. Jul. 21, 2014); *Navarro v. Servisair, LLC*, 2008 U.S. Dist. LEXIS 62513, *21-22 (N.D. Cal. Aug. 14, 2008).

22. Over the last four years, TMs have earned, on average, approximately \$69,485.52 per year. See Weiss Decl. ¶ 4. Divided by an average of 2,080 hours per year (52 weeks times 40 hours a week, the methodology to determine the hourly rate if TMs were non-exempt employees), TMs earned approximately \$33.41 per hour (\$69,485.52/2,080). Overtime at this rate would be \$50.11 per hour (1.5 x \$33.41), and the double time would be \$66.82 per hour (2 x \$33.41). If each putative class member worked five overtime and one doubletime hour per pay period, then the damages would be approximately \$317.37 per pay period (5 OT hours [\$250.55] + 1 DT hour [\$66.82]). Ecolab pays its TMs semi-monthly, and there have been 104 pay periods since June 6, 2010. See *id.* On average, approximately 129.2 TM Full-Time Equivalents (“FTE”s) have worked for Ecolab throughout the four-year class period, which, multiplied by the number of pay periods, amounts to a total of 13,436 worked pay periods during the class period (129.2 x 104). See *id.* If TMs were each owed \$317.37 in overtime and doubletime per pay period, then the total potential damages for unpaid wages in Plaintiffs’ First Cause of Action would be **\$4,264,183** (\$317.37 x 13,436).

2. Plaintiffs Have Alleged Approximately \$320,400 In Waiting-Time Penalties.

23. Plaintiffs have also alleged a claim for waiting-time penalties in the First Cause of Action. See Rahm Decl., Exh. B at ¶ 13. Plaintiffs have alleged that Ecolab has “willfully

1 failed to pay without abatement ... all of the wages of the Plaintiffs and the Class.” *Id.* Likewise, as
 2 noted above, Plaintiffs have alleged that they “and *all* members of the Class regularly worked hours
 3 for which they were not paid the correct hourly wage.” *Id.* at ¶ 11 (emphasis added). Plaintiffs have
 4 thus alleged a 100% violation rate for all TMs who have separated from Ecolab in the last three
 5 years. Labor Code section 203 would entitle Plaintiffs and the putative class members 30 days of
 6 day wages as a result of the willful nonpayment of all wages owed. *See* Lab. Code § 203.

7 24. Forty TMs have separated from Ecolab in the last three years. *See* Weiss
 8 Decl. ¶ 4. Dividing the average TM’s annual compensation by 260 work days (52 weeks x 5 days)
 9 equals \$267 of wages per day (\$69,485.52/260). Multiplying number of separated TMs by the
 10 amount of one day’s wages by 30 days yields **\$320,400** (40 x \$267 x 30).

11 **3. Plaintiffs Have Alleged Approximately \$406,350 In Statutory Penalties**
 12 **Pursuant To Labor Code Section 226(e).**

13 25. In their Second Cause of Action, Plaintiffs allege that Ecolab has a pattern and
 14 practice of knowingly and intentionally issuing wage statements that do not comply with Labor Code
 15 section 226(a) with respect to “each respective pay period.” *See* Rahm Decl., Exh. B at ¶ 22.
 16 Plaintiffs seek statutory penalties for Ecolab’s alleged noncompliance pursuant to Labor Code
 17 section 226(e), which provides a penalty of \$50 for a violation in the first pay period and \$100 for a
 18 violation of each subsequent pay period up to a maximum of \$4,000. *See id.* at ¶¶ 23-24.

19 26. Plaintiffs’ original complaint was filed on June 4, 2014. The statute of
 20 limitations on a Labor Code section 226(e) claim is one year, and there has been approximately 32
 21 pay periods to date since June 4, 2013. During this period, Ecolab had approximately 129.2 Full-
 22 Time Equivalent (“FTE”) TM positions. *See* Weiss Decl. ¶ 4. Potential liability based on Plaintiff’s
 23 wage-statement claim would thus be: \$6,450 (129 x \$50) for the first pay period, and \$399,900 (129
 24 x \$100 x 31) for the remaining pay periods. The total statutory penalties under section 226 would
 25 thus be approximately **\$406,350** (\$6,450 + \$348,300).

26 **4. Plaintiffs Have Alleged Over \$ 2.9 Million In Civil Penalties Pursuant To**
 27 **The PAGA.**

28 27. Plaintiffs’ Fourth Cause of Action is for civil penalties pursuant to the PAGA
 based on violations of Labor Code sections 201, 202, 204, 219, 226(a), and 510. *See* Rahm Decl.,

Exh. B at ¶¶ 42-50. Pursuant to the PAGA, an aggrieved employee can seek the civil penalties that are specified for violations of certain Labor Code sections and, where no civil penalty section is provided, an aggrieved employee may seek default PAGA civil penalties. *See* Lab. Code § 2699(a), (f). The statute of limitations on a PAGA claim is one year. *See Thomas v. Home Depot USA Inc.*, 527 F. Supp. 2d 1003 (N.D. Cal. 2007).

a. Plaintiffs' Alleged Civil Penalties For The Violation Of Labor Code Sections 201 and 202 Amount To Approximately \$320,400.

28. Plaintiffs allege that, pursuant to Labor Code sections 201 and 202, Ecolab did not pay its California TMs who separated from Ecolab all wages owed at the time of their separation, and that Labor Code section 256 is the civil penalty provision for violations of sections 201 and 202. *See* Rahm Decl., Exh. B at ¶ 44. Labor Code section 256 provides for up to “30 days pay as waiting time under the terms of Section 203.” Lab. Code § 256. There have been 40 California TMs who have separated from Ecolab in the last three years. *See* Weiss Decl. ¶ 4. Pursuant to Plaintiffs' theory of recovery, they would be able to recover 40 (number of TMs who separated) x \$8,010 (30 days x \$267) = **\$320,400**.

b. Plaintiffs' Alleged Civil Penalties For The Violation Of Labor Code Section 204 Amount To Approximately \$41,280.

29. Plaintiffs allege that, pursuant to Labor Code section 204, Ecolab did not pay them all wages due for work performed during each pay period, and that Labor Code section 210 is the civil penalty provision for violations of section 204. *See* Rahm Decl., Exh. B at ¶ 45. Labor Code section 210 provides \$100 per pay period for each failure to pay each employee. *See* Lab. Code § 210. Since June 4, 2013, Ecolab's California TMs have worked 4,128 pay periods (129 x 32). *See* Weiss Decl. ¶ 4. The potential civil penalties on such a claim would thus be **\$41,280** (4,128 x \$100).

c. Plaintiffs' Alleged Civil Penalties For The Violation Of Labor Code Section 219 Amount To Approximately \$41,280.

30. Plaintiffs allege that, pursuant to Labor Code section 219, Ecolab used private agreements to circumvent “the wage-and-hour laws of the Labor Code,” and that the civil penalty for such a violation is \$100 per pay period pursuant to Labor Code section 2699(f). *See* Rahm Decl.,

Exh. B at ¶ 46. Since June 4, 2013, Ecolab's California TMs have worked 4,128 pay periods (129 x 32). *See* Weiss Decl. ¶ B. The potential civil penalties on such a claim would thus be \$41,280 (4,128 x \$100).

d. Plaintiffs' Alleged Civil Penalties For The Violation Of Labor Code Section 226(a) Amount To Approximately \$1,032,000.

31. Plaintiffs allege that Ecolab violated Labor Code section 2226(a) by not providing its employees with compliant wage statements, and that the civil penalty for such a violation is \$250 per pay period pursuant to Labor Code section 226.3. *See* Rahm Decl., Exh. B at ¶ 48. Since June 4, 2013, Ecolab's California TMs have worked 4,128 pay periods (129 x 32). *See* Weiss Decl. ¶ 4. The potential civil penalties on such a claim would thus be \$1,032,000 (4,128 x \$250).

e. Plaintiffs' Alleged Civil Penalties For The Violation Of Labor Code Section 510 Amount To Over \$1.5 Million.

32. Plaintiffs allege that Ecolab violated Labor Code section 510 by not providing its employees with overtime premium wages, and that Labor Code section 558 provides the civil penalty for such a violation. *See* Rahm Decl., Exh. B at ¶ 50. Labor Code section 558 provides for a civil penalty of \$50 per pay period "in addition to an amount sufficient to recover underpaid wages." Lab. Code § 558. As discussed above, Plaintiffs have alleged that they and the putative class members were underpaid by \$317.37 (5 OT hours [\$250.55] + 1 DT hour [\$66.82]) per pay period. Since June 4, 2013, Ecolab's California TMs have worked 4,128 pay periods (129 x 32). *See* Weiss Decl. ¶ 4. The potential civil penalties on such a claim would thus be \$1,516,503 (4,128 x \$367.37 [\$50 + \$317.37]).

33. Plaintiff has thus alleged civil penalties under PAGA of approximately \$2,951,463. There has been a dispute amongst the district courts as to how much in civil penalties should count towards the jurisdictional minimum. Some courts count the entire amount of civil penalties. *See, e.g., Patel v. Nike Retail Services, Inc.*, 2014 U.S. Dist. LEXIS 98918, *25-40 (N.D. Cal. July 21, 2014). Other courts have held that because the aggrieved employees would only be entitled to 25% of the civil penalties collected, only this amount should be able to count towards satisfying the jurisdictional minimum. *See Willis v. Xerox Bus. Servs., LLC*, 2013 U.S. Dist. LEXIS

163144 (E.D. Cal. Nov. 14, 2013). To err on the side of prudence, Ecolab will count only 25% of the total alleged civil penalties. Labor Code section 558 provides that the “underpaid” portion of the penalty is to be distributed directly to the aggrieved employees, which amounts to \$1,310,103 (4,128 x \$317.37). Accordingly, of the \$2,951,463 in PAGA civil penalties alleged, only \$1,641,360 would be subject to the 75% reduction (\$2,951,463 - \$1,310,103). 25% of \$1,641,360 = \$410,340. The total amount that can thus be claimed towards the jurisdictional minimum would be **\$1,720,443** (\$1,310,103 + \$410,340).

IV. NOTICE OF REMOVAL TO THE COURT AND ADVERSE PARTY

34. Contemporaneously with the filing of this Notice of Removal in the United States District Court for the Northern District of California, written notice of such filing will be given by the undersigned to Plaintiffs’ counsel of record, and a copy of the Notice of Removal will be filed with the Clerk of the Court for the Superior Court of the County of Santa Clara, California as required by 28 U.S.C. section 1446(d).

V. CONCLUSION

35. Ecolab has demonstrated potential liability based on Plaintiffs’ allegations of \$4,264,183 for potential damages, \$726,750 for potential statutory penalties, and \$1,720,443 as 25% of potential civil penalties (minus Labor Code section 558 penalties), which total to **\$6,711,376**. Ecolab has thus met the CAFA jurisdictional minimum amount to remove this action to federal court.

Dated: September 26, 2014

/s/ Richard H. Rahm
 RICHARD H. RAHM
 LITTLER MENDELSON, P.C.
 Attorneys for Defendant
 ECOLAB INC.

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